Supreme Court, U.S.
FILED

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No. 02-_____

In the Supreme Court of the United States

OCTOBER TERM, 2002

GEORGE BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL REESE,

Petitioner, Civil No. 98-851 ST

v.

GEORGE H. BALDWIN, FINDINGS AND RECOMMENDATION

Respondent.

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STEWART, Magistrate Judge.

Petitioner, an inmate at the Eastern Oregon Correctional Institution, brings this petition for writ of habeas

corpus pursuant to 28 U.S.C. § 2254. Currently before the court is petitioner's Amended Petition (#19).

BACKGROUND

Petitioner was convicted in 1991 on two counts of first-degree kidnapping and one count of first-degree attempted sodomy. Following a bench trial, petitioner was sentenced to a 30-year determinate sentence as a dangerous offender on each kidnapping count, to be served concurrently with each other. He was also sentenced to a 36-month sentence for attempted sodomy, to be served consecutively to the kidnapping sentences.

Petitioner directly appealed. In State v. Reese, 114 Or.App. 557, 836 P.2d 737 (1992), the Oregon Court of Appeals affirmed the convictions but remanded the case for re-sentencing, holding:

> [The dangerous offender statute] provides a specific exception for treatment within the guidelines system for dangerous offenders. It provides that dangerous offender findings constitute a basis for a departure. Although the court may impose an indeterminate sentence on the basis of those findings, it must indicate the presumptive sentence that would have otherwise been imposed. The entire 30-year sentence does not necessarily have to be served because, once the presumptive sentence has been served, the offender becomes eligible for consideration for post-prison supervision.

Id. at 560 (citing O.R.S. 144.232(1)).

On March 4, 1993, represented by the same attorney who had represented him at trial and the first sentencing,

petitioner was re-sentenced to 30 years' imprisonment as a dangerous offender on the kidnapping convictions and to the same 36-month sentence for attempted sodomy. The court imposed a guidelines departure sentence as the presumptive term.

Petitioner again directly appealed. In State v. Reece, 128 Or.App. 323, 876 P.2d 317 (1994), the Oregon Court of Appeals again reversed and remanded the case for re-sentencing. As the court stated: "The trial court was required to impose the presumptive sentence under the sentencing guidelines as the determinate part of its dangerous offender sentence. It failed to do so." Id. at 326, 876 P.2d at 319.

On September 9, 1994, petitioner was again re-sentenced. A different attorney was appointed to represent petitioner at the second re-sentencing. Petitioner objected to the new attorney, and ended up appearing *pro se* before the court. This time, the prosecutor dropped his request that petitioner be sentenced as a dangerous offender, and the court sentenced petitioner to a guidelines departure sentence of 260 months on each of the kidnapping convictions, to be served concurrently with each other. Petitioner again received a 36-month consecutive sentence for the attempted sodomy conviction.

Petitioner appealed his second re-sentencing. Petitioner's attorney on appeal filed a Balfour brief on petitioner's behalf.[1] The Oregon Court of Appeals affirmed

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[1] A Balfour brief, which is described and discussed in more detail below, essentially consists of two parts: (1) a statement of facts and procedural history which is prepared and signed by appellate counsel; and (2) a statement of claims or errors which is

without opinion. State v. Reese, 134 Or. App. 629, 894 P.2d 1268 (1995). Petitioner's counsel did not seek review by the Oregon Supreme Court.

Petitioner then filed a petition for state post-conviction relief ("PCR") in the Umatilla County Circuit Court. After a hearing, the post-conviction trial court denied relief. Petitioner appealed the denial of his PCR petition. Again, however, appointed counsel filed a purported Balfour brief on petitioner's behalf. The state moved the Oregon Court of Appeals for summary affirmance, which petitioner's attorney did not oppose. The Oregon Court Appeals granted the motion for summary affirmance, and the Oregon Supreme Court denied review.

Petitioner, appearing pro se, filed a Petition for Writ of Habeas Corpus in this court on July 13, 1998, asserting 11 grounds for relief. After appointment of counsel, he filed an Amended Petition on March 11, 1999, alleging the following four grounds for relief:

> Ground 1: [Petitioner] received ineffective assistance of trial counsel at trial, due to his counsel's failure to investigate the background and conduct of the chief prosecuting witness and to use highly damaging impeachment evidence against her.
>
> Ground 2: [Petitioner] did not knowingly, intelligently, and voluntarily waive his right to

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prepared and signed by the petitioner. See State v. Balfour, 311 Or. 434, 814 P.2d 1069 (1991).

> counsel at his most recent sentencing proceeding.
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> Ground 3: The sentences for kidnapping imposed by the trial court at the most recent sentencing are vindictive, in violation of the Fifth Amendment Double Jeopardy clause.
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> Ground 4: [Petitioner] received ineffective assistance from his appellate counsel, who refused to raise any issues, failed to raise two meritorious issues, failed to withdraw, and failed to exhaust [petitioner's] state remedies by refusing to file a petition for review in the Oregon Supreme Court.

Respondent moves to deny habeas corpus relief, contending that the claims alleged in petitioner's Amended Petition are procedurally defaulted and lack merit. Respondent also contends that to the extent the claims are not defaulted, the Oregon state court decisions denying relief on the claims are entitled to deference because they involve reasonable determinations of facts and applications of federal law.

LEGAL STANDARDS

I. Procedural Default

A state prisoner must exhaust all available state court remedies either on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. Keeney v. Tamayo-Reyes, 504 U.S. 1, 9 (1992); Duckworth v. Serrano, 454 U.S. 1, 3 (1981). A prisoner satisfies the exaustion requirement by "fairly" presenting his claims to the highest state court with juris-

diction to consider them. Keeney, 504 U.S. at 9; Picard v. Connor, 404 U.S. 270, 276 (1971).

If it is clear that no state remedies remain available to the petitioner, the exhaustion requirement is satisfied. See Coleman v. Thompson, 501 U.S. 722, 732 (1991); see also Kellotat v. Cupp, 719 F.2d 1027, 1029 (9th Cir. 1983). Nevertheless, habeas corpus relief must be denied if the petitioner has procedurally defaulted on a claim in state court. When a habeas petitioner at one time could have raised his federal claim in state court but did not and is now barred from doing so by a state procedural rule, he has procedurally defaulted that claim. Murray v. Carrier, 477 U.S. 478, 485 (1986).

II. Relief on the Merits

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Ninth Circuit Court of Appeals provided a framework for analyzing state court decisions under this statute in Davis v. Kramer, 167 F.3d 494 (9th Cir.), pet'n for cert. filed, 67 U.S.L.W. 3570 (March 8, 1999). Under Davis:

> [A] state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.

Id. at 500.

As the Ninth Circuit more recently noted, "[u]nfortunately, when a state court does not articulate the rationale for its determination, a review of that court's 'application' of clearly established law is not possible." Delgado v. Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999) (citing Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir.), cert. denied, 119 S.Ct. 587 (1998)). "Thus, when confronted with a state court decision that does not provide the basis of its decision, we must determine whether, in light of an independent review of the record and the relevant federal law, the state court's resolution of a petitioner's claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Id. (citing 28 U.S.C. § 2254(d)(1)). This is not the equivalent of applying a *de novo* standard of review to state court decisions. Id. at 1091 n.3.

DISCUSSION

I. Ground One – Ineffective Assistance of Trial Counsel

A. Procedural Default

Respondent contends that plaintiff procedurally defaulted his first ground for relief because he did not properly allege or specifically argue in the PCR proceeding that trial counsel failed to investigate the background and conduct of the chief prosecuting witness and failed to use damaging impeachment evidence against her. Respondent also contends that even if petitioner fairly presented this claim to the PCR trial court, the claim is still defaulted because it was not presented to the Oregon Supreme Court.

By respondent's own admission, however, petitioner alleged and argued in the PCR proceeding that his trial counsel failed to obtain the victim's reports and records which would have shown inaccuracies and false statements made by the victim at trial. He argued that counsel failed to question witnesses, object to witnesses who could not identify petitioner, and present witnesses who would have testified that the crimes could not have happened as the witness said. He testified specifically that this counsel told him that "[the victim] had already been convicted of giving false information to the police department." Resp. Ex. 117 at 9. To find on these facts that petitioner did not fairly present his ineffective assistance of trial counsel claim to the PCR trial court would be to engage in exactly the sort of "hairsplitting" recently condemned by the Ninth Circuit Court of Appeals. See, Weaver v. Thompson, - - - F.3d - - -, 1999 WL 1062837 *4 (9th Cir. November 24, 1999).

Not only did petitioner fairly present his ineffective assistance of counsel claim to the PCR trial court, he specifically raised the claim both on appeal to the Oregon Court of Appeals and in his petition for review before the Oregon Supreme Court. Although his counsel on appeal from the denial of PCR did not set forth a detailed factual argument in the petition for review, the petition nonetheless repeats the same claim(s) raised in the PCR petition, including the ineffective assistance of counsel claim. Ex. 128, pp. 3-9. As such, petitioner did not procedurally default his first ground for relief.

B. Relief on the Merits

Petitioner alleges that he received ineffective assistance of counsel at trial as a result of his attorney's failure to investigate the background and conduct of the chief prosecuting witness and to use highly damaging impeachment evidence against her. In his memorandum in support of his Amended Petition, petitioner argues specifically that trial counsel should have discovered and impeached the victim with information relating to: 1) a false fire complaint; 2) history of assaults; 3) an escape conviction; and 4) mental health and anger control treatment.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must show both (1) that his attorney's performance fell below an objective standard of reasonableness; and (2) that the performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Chacon v. Wood, 36 F.3d 1459, 1463 (9th Cir. 1994). The first part of this test requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by

the Sixth Amendment." Strickland, 466 U.S. at 687. While this burden is not insurmountable, a strong presumption exists that counsel's conduct falls within "the wide range of reasonable professional assistance." Id. at 689; Wade v. Calderon, 29 F.3d 1312, 1316 (9th Cir. 1994) (quoting Strickland, 466 U.S. at 689), cert. denied, 513 U.S. 1120 (1995).

To establish the second prong of the Strickland test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In determining whether a defendant was prejudiced by ineffective assistance of counsel, the court should examine whether the "'result of the proceeding was fundamentally unfair or unreliable.'" United States v. Palomba, 31 F.3d 1456, 1460–61 (9th Cir. 1994) (quoting Lockhart v. Fretwell, 506 U.S. 364, 368 (1993)).

Assuming that the exhibits attached to petitioner's memorandum are properly before this court, and further assuming that by failing to use the impeachment evidence against the victim trial counsel made errors so serious that he was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment, I nevertheless find that petitioner could not show that he was prejudiced in any way by the alleged shortcomings. In light of petitioner's own inconsistent account of the event, even if the impeachment evidence cited by petitioner had been used at trial, it is not reasonably probable that the result of the proceedings would have been different. Accordingly, petitioner is not entitled to relief on his

claim that he received ineffective assistance of trial counsel.

II. Ground Four – – Ineffective Assistance of Appellate Counsel[2]

A. Procedural Default

Respondent contends that petitioner procedurally defaulted his ineffective assistance of appellate counsel claim because it was not properly alleged in his PCR petition and therefore was not actually litigated at the PCR trial court level. Even if the claim was properly raised before the PCR trial court, however, respondent further contends that it was nevertheless not "fairly presented" to the Oregon appellate courts.

Petitioner's ineffective assistance of appellate counsel claim was raised and decided at the PCR trial court level. The trial court received legal argument and evidence on the issue and directly addressed the claim in its Memorandum of Opinion. Ex. 123, p. 4.

The more difficult issue is whether the claim was "fairly presented" to Oregon's appellate courts. Section A of the brief on appeal prepared by petitioner's counsel, purporting to satisfy the minimal requirements of Balfour, fails to raise this claim. Section B of the brief, which ordinarily consists of the assignments of error and argument provided by the prisoner, merely repeats the same claims for relief alleged in the PCR petition. Those claims, however, include the following:

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[2] For reasons that will become clear below, the grounds for relief are considered out of order for the purposes of the procedural default analysis.

Second Claim For Relief: Ineffective Assistance of Appellate Counsel.

Facts: Mr. Jesse Wm. Barton did knowingly and willfully fail to file in a timely matter a notice of my intention to appeal in the Oregon ruling to the Oregon Supreme Court as I had informed their office by mail. Their response was that I had to file pro-se and that they would not help me. I informed them that previous case law indicated that this per se ineffective assistance of counsel.

Mr. Jesse Wm. Barton did fail to raise issues on appeal. The prosecuting Attorney's did state in their Brief that I the defendant did fail to raise the issues in my arguments. It is not that I the defendant failed to raise the arguments but that this Attorney failed to raise the issues for me as I asked stating that I was to raise the issues on post-conviction.

Ex. 125, pp. 5-6.

Petitioner fared better in the petition for review filed with the Oregon Supreme Court. There his counsel at least mentioned the pertinent federal constitutional provisions. Ex. 127, pp. 2–3.

Although it is a close call, I find that petitioner fairly presented his ineffective assistance of counsel claim on appeal. As in Delgado v. Lewis, 181 F.3d at 1091, "[a]lthough petitioner did not specifically argue that the brief filed by his appellate counsel violated Anders v. California, 386 U.S. 738 (1967), his petition was sufficient to alert the state to both state and federal precedent

governing his claim of ineffective assistance of counsel, including Anders." Here petitioner asserted that his appellate counsel failed to raise issues that petitioner asked him to raise. That assertion is sufficient to alert the state court to "both state and federal precedent governing his claim of ineffective assistance of counsel." Id. Moreover, by granting the state's motion for summary affirmance on the basis that no substantial question of law was presented, the Court of Appeals made "a decision upon the merits of the appeal." O.R.S. 138.660. Accordingly, I find that petitioner did not procedurally default his ineffective assistance of appellate counsel claim.

B. Relief on the Merits

Petitioner contends that his representation during his direct appeal from the second re-sentencing was unconstitutionally ineffective under Anders v. California, 386 U.S. 738 (1967). In Anders, the Supreme Court instructed court-appointed counsel how to comply with the constitutional requirement of furthering a client's case after determining the appeal to lack merit:

> [I]f counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it

> may grant counsel's request to withdraw and dismiss the appeal. . . .

Id. at 744.

The Oregon Supreme Court interpreted Anders in State v. Balfour, 311 Or. 434, 814 P.2d 1069 (1991). After reviewing the constitutional requirements of Anders in conjunction with the Oregon's disciplinary rules governing attorneys, the Balfour court held that a court-appointed appellate attorney "who, after a diligent examination of the whole record and appropriate consultation with defendant and trial counsel, is faced with a conclusion that only frivolous issues exist for appeal, has no mandatory ethical obligation to withdraw from the representation." Balfour, 311 Or. at 448, 814 P.2d at 1078. The court then concluded that in the absence of a duty to withdraw, an Anders brief is not constitutionally required. Id. at 450, 814 P.2d at 1079. The court explained its conclusion as follows:

> If, however, counsel does not seek to withdraw, the core constitutional concerns for which the Anders brief were designed disappear. First, there will be no danger of the indigent appellant's proceeding unrepresented through the appeal. Second, the appellate court will not need an Anders brief to assess whether to permit counsel to withdraw, because counsel will not have withdrawn.

Id. at 450-51, 814 P.2d at 1079.

The court then set forth the following procedures for the Oregon courts to follow with respect to direct criminal appeals by indigent persons with a constitutional right to counsel:

1. Appointed counsel shall file a timely notice of appeal (if one has not been filed before counsel was appointed) in all cases which the client wishes to take an appeal;
2. Appointed counsel shall review thoroughly the record and discuss the case with trial counsel and the client;
3. If counsel thereafter determines that there are no meritorious issues for appeal, counsel nonetheless shall seek to provide the "active advocacy" demanded by Anders to the fullest extent ethically possible. That can be done by filing an appellant's brief with the court that meets the following standards.
4. The appellant's brief shall be divided into two sections, Section A and Section B. Section A of the appellant's brief shall contain a statement of the case, including a statement of facts, sufficient to apprise the court of the jurisdictional basis for the appeal. Section A, under those circumstances, shall contain no assignments of error or argument.
5. Counsel shall also determine whether the client seeks to raise with the court any issue that the lawyer has determined to be frivolous. If the client does not seek to raise any issue, then the appellant's brief shall be

comprised solely of Section A, as described above.

6. If the client seeks to raise one or more issues with the court that counsel considers to be frivolous, the brief shall contain a presentation of the issue or issues in a Section B. Section B of the appellant's brief, under those circumstances, shall raise any claim of error requested by the client.

7. Counsel shall provide the client with appropriate legal advice on these claims of error, but shall present to the court in the brief the issue that the client seeks to raise in the manner that the client seeks to raise it. In so doing, counsel's role is limited to attempt to see to it that the client states the issues and arguments in proper appellate brief form and the brief is timely filed.

Id. at 450-51 (internal citations omitted). The case goes on to provide:

> The Court of Appeals shall consider and decide whatever issues are raised in these appeals in the same manner as it considers and decides issues that are raised in any other direct criminal appeal. The Court of Appeals is not required to search the record for error, whether an appeal is filed by a person who has appointed counsel or retained counsel, because a defendant represented by retained counsel would not necessarily receive such a review on appeal.

Id. at 452-53.

In a trio of recent cases, the Ninth Circuit Court of Appeals examined a very similar set of procedures used in the State of California pursuant People v. Wende, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (1979), and found them lacking under Anders. See Robbins v. California, 152 F.3d 1062 (9th Cir. 1998), cert. granted, 119 S.Ct. 1139 (1999); Davis v. Kramer, supra; Delgado v. Lewis, supra. California's procedure described in Robbins differs from Oregon's Balfour requirements only to the extent that after briefly outlining the facts surrounding the trial and failing to present any possible grounds for appeal, the California appellate counsel included a request that the court itself review the record for arguable issues. Robbins, 152 F.3d at 1064. Counsel also "pledged to remain 'available to brief any [issue(s)] upon invitation of the court.'" Id. A virtually identical procedure was described in both Davis and Delgado. In all three cases, the Ninth Circuit found that the California procedure essentially left the inmates to "shift for themselves," a situation that Anders specifically disapproved.

Oregon's Balfour procedure likewise fails to comport with the constitutional requirements set forth in Anders. If anything, the Oregon procedure provides even less protection to a petitioner than California's procedure. At least in California, the appellate court itself undertook an independent review of the record, a burden from which Balfour expressly relieves the Oregon appellate courts. As the Ninth Circuit pointed out in Robbins, "[o]ur opinion in no way relieves the state court judges of their obligation under Anders . . . to conduct their own independent review of the proceedings to decide whether the

appeal is wholly frivolous." Robbins, 152 F.3d at 1067 n.2.

Respondent attempts to distinguish the Balfour procedure from the California procedure condemned in Davis, Robbins, and Delgado. Respondent argues that instead of simply inviting the Oregon Court of Appeals to conduct an independent review of the record to see if it could find any constitutional violations as under Wende, appellate counsel here "assisted petitioner in preparing his brief, and included in it all the issues that petitioner wished to raise." This distinction, however, does not resolve the underlying lack of advocacy on the part of appellate counsel. As in Anders, Davis, Robbins, and Delgado, petitioner's appellate attorney did not identify any arguable appellate issues, but left petitioner essentially to "shift entirely for himself" and thereby failed to fulfill the "role of an active advocate" required by the constitution. Anders, 386 U.S. at 745.

According to Anders, the Balfour brief filed by petitioner's appellate attorney on direct appeal from the second re-sentencing does not satisfy federal constitutional standards. Accordingly, petitioner is entitled to a conditional writ of habeas corpus, whereby the State of Oregon should be required to reinstate petitioner's direct appeal from the second re-sentencing, and appoint new appellate counsel to represent him.[3]

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[3] Having found that petitioner's right to effective assistance of appellate counsel was violated, this court need not decide whether the violation resulted in prejudice to the petitioner. "[T]he failure of [petitioner's] counsel to raise arguable issues in the appellate brief creates a presumption of prejudice." Delgado, 181 F.3d at 1093

III. Grounds 2 and 3 – – Waiver of Right to Counsel and Vidictive Sentence

In his second and third grounds for relief, petitioner alleges that he did not voluntarily waive his right to counsel at the second re-sentencing, and that the second re-sentencing resulted in an unconstitutionally vindictive sentence. Neither of these grounds have been exhausted in state court.[4]

If the claims had been exhausted, or if the claims had addressed the legality of the conviction rather than the sentence, then it would be incumbent upon this court to decide those claims on the merits, notwithstanding the recommendation that the writ be conditionally granted on petitioner's ineffective assistance of counsel claim. See Robbins, 152 F.3d at 1068. Where, however, the claims have not been exhausted, a federal court should not "sit in place of the [Oregon] Court of Appeals in the first instance to determine whether petitioner was prejudiced as to any appellate issue." Penson, 488 U.S. at 87 n.9. Principals of comity dictate that the Oregon appellate courts first be given the opportunity to decide whether petitioner voluntarily waived his right to counsel at the second re-sentencing, and whether the second re-sentencing resulted in an unconstitutionally vindictive sentence. Accordingly, this court should not rule upon petitioner's second and third grounds for relief.

(citing Penson v. Ohio, 488 U.S. 75, 86 (1988)); Davis, 167 F.3d at 499).

[4] Petitioner attempted to raise both grounds in his portion of the Balfour brief filed on direct appeal, but he filed no petition for review with the Oregon Supreme Court. Thus, the issues were not fairly presented to Oregon's highest court.

RECOMMENDATION

Based on the foregoing, I recommend that the Amended Petition (docket #19) be DENIED on petitioner's first ground for relief, conditionally GRANTED on petitioner's fourth ground for relief, and DENIED as premature on petitioner's second and third grounds for relief. Accordingly, the State of Oregon should be required to reinstate petitioner's direct appeal from his second re-sentencing and to appoint counsel to represent petitioner on that appeal.

SCHEDULING ORDER

Objections to these Findings and Recommendation, if any, are due **January 24, 2000.** If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, then the response is due no later than **February 10, 2000.** When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under advisement.

DATED this 3rd day of January, 2000.

s/Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL REESE,

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v.

GEORGE H. BALDWIN,

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Assistant Attorney General
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Attorneys for Respondent

STEWART, Magistrate Judge.

Petitioner, an inmate at the Eastern Oregon Correctional Institution, brings this Amended Petition for Writ

of Habeas Corpus pursuant to 28 U.S.C. § 2254. On January 4, 2000, this court entered a Findings and Recommendation on petitioner's Amended Petition. On March 15, 2000, respondent then filed a Motion for Reconsideration of the Findings and Recommendation. Upon reconsideration, the Findings and Recommendation are hereby AMENDED as follows:

BACKGROUND

Petitioner was convicted in 1991 on two counts of first-degree kidnapping and one count of first-degree attempted sodomy. Following a bench trial, petitioner was sentenced to a 30-year determinate sentence as a dangerous offender on each kidnapping count, to be served concurrently with each other. He was also sentenced to a 36-month sentence for attempted sodomy, to be served consecutively to the kidnapping sentences.

Petitioner directly appealed. In State v. Reese, 114 Or. App. 557, 836 P.2d 737 (1992), the Oregon Court of Appeals affirmed the convictions but remanded the case for re-sentencing, holding:

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On March 4, 1993, represented by the same attorney who had represented him at trial and the first sentencing, petitioner was re-sentenced to 30 years' imprisonment as a dangerous offender on the kidnapping convictions and to the same 36-month sentence for attempted sodomy. The court imposed a guidelines departure sentence as the presumptive term.

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> Ground 1: [Petitioner] received ineffective assistance of trial counsel at trial, due to his counsel's failure to investigate the background and conduct of the chief prosecuting witness and to use highly damaging impeachment evidence against her.

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[1] A Balfour brief, which is described and discussed in more detail below, essentially consists of two parts: (1) a statement of facts and procedural history which is prepared and signed by appellate counsel; and (2) a statement of claims or error which is prepared and signed by the petitioner. See State v. Balfour, 311 Or. 434, 814 P.2d 1069 (1991).

> Ground 2: [Petitioner] did not knowingly, intelligently, and voluntarily waive his right to counsel at his most recent sentencing proceeding.
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> Ground 3: The sentences for kidnapping imposed by the trial court at the most recent sentencing are vindictive, in violation of the Fifth Amendment Double Jeopardy clause.
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I. Procedural Default.

A state prisoner must exhaust all available state court remedies either on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. Keeney v. Tamayo-Reyes, 504 U.S. 1, 9 (1992); Duckworth v. Serrano, 454 U.S. 1, 3 (1981). A prisoner satisfies the exhaustion requirement by

"fairly" presenting his claims to the highest state court with jurisdiction to consider them. Keeney, 504 U.S. at 9; Picard v. Connor, 404 U.S. 270, 276 (1971).

If it is clear that no state remedies remain available to the petitioner, the exhaustion requirement is satisfied. See Coleman v. Thompson, 501 U.S. 722, 732 (1991); see also Kellotat v. Cupp, 719 F.2d 1027, 1029 (9th Cir. 1983). Nevertheless, habeas corpus relief must be denied if the petitioner has procedurally defaulted on a claim in state court. When a habeas petitioner at one time could have raised his federal claim in state court but did not and is now barred from doing so by a state procedural rule, he has procedurally defaulted that claim. Murray v. Carrier, 477 U.S. 478, 485 (1986).

II. Relief on the Merits.

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

After the original Findings and Recommendations were filed, and, indeed, after respondent's Motion for Reconsideration and petitioner's response thereto were filed, the United States Supreme Court interpreted § 2254(d) in Williams v. Taylor, 120 S.Ct. 1495 (2000). The Ninth Circuit recently provided further guidance on the proper standards of review under § 2254(d) in Van Tran v. Lindsey, --- F.3d ---, 2000 WL 622070 (9th Cir. May 16, 2000).

Under Williams, a state court's decision can be "contrary to" federal law either:

> 1) if it fails to apply the correct controlling authority, or
>
> 2) if it applies the controlling authority to a case involving facts "materially indistinguishable" from those in a controlling case, but nonetheless reaches a different result.

Van Tran, 2000 WL 622070 *3, citing Williams, 120 S.Ct. at 1519–20.

A state court's decision can involve an "unreasonable application" of federal law if it either:

> 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or
>
> 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable.

Id.

The Ninth Circuit determined that a state court's decision involves an "unreasonable application" of clearly established federal law when "our independent review of the legal question does not merely allow us ultimately to conclude that the petitioner has the better of the two arguments, but rather leaves us with a 'firm conviction' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous -- in other words that clear error occurred." Van Tran, at *7.

The appropriate source of law for determining "clearly established law as determined by the Supreme Court of the United States" is the holdings, as opposed to the dicta, of the Supreme Court. Williams, 120 S.Ct. at 1523. As the Ninth Circuit explains this limitation, "there is still a role for circuit law in habeas cases: we still look to our own law for its persuasive authority in applying Supreme Court law; however, only the Supreme Court's holdings are binding on the state courts and only those holdings need be 'reasonably' applied." Van Tran, at *7, citing Duhaime v. Ducharme, 200 F.3d 597, 600–01 (9th Cir. 1999).

Finally, the Ninth Circuit set forth a methodology for applying § 2254(d). "[W]hen analyzing a claim that there has been an unreasonable application of federal law, we must first consider whether the state court erred; only after we have made that determination may we then consider whether any error involved an unreasonable application of controlling law within the meaning of § 2254(d)." Id., at *8.

Neither Williams nor Van Tran consider another difficulty encountered in applying § 2254(d), that is when

the state court decision is summarily made, without written opinion. As the Ninth Circuit has noted "[u]nfortunately, when a state court does not articulate the rationale for its determination, a review of that court's 'application' of clearly established law is not possible." Delgado v. Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999), cert. granted, judgment vacated on other grnds, 120 S.Ct. 1002 (2000). (citation omitted). "Thus, when confronted with a state court decision that does not provide the basis of its decision, we must determine whether, in light of an independent review of the record and the relevant federal law, the state court's resolution of a petitioner's claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Id., citing 28 U.S.C. § 2254(d)(1).

DISCUSSION

I. Ground One – Ineffective Assistance of Trial Counsel

A. Procedural Default

Respondent contends that plaintiff procedurally defaulted his first ground for relief because he did not properly allege or specifically argue in the PCR proceeding that trial counsel failed to investigate the background and conduct of the chief prosecuting witness and failed to use damaging impeachment evidence against her. Respondent also contends that even if petitioner fairly presented this claim to the PCR trial court, the claim is still defaulted because it was not presented to the Oregon Supreme Court.

By respondent's own admission, however, petitioner alleged and argued in the PCR proceeding that his trial

counsel failed to obtain the victim's reports and records which would have shown inaccuracies and false statements made by the victim at trial. He argued that counsel failed to question witnesses, object to witnesses who could not identify petitioner, and present witnesses who would have testified that the crimes could not have happened as the witness said. He testified specifically that his counsel told him that "[the victim] had already been convicted of giving false information to the police department." Resp. Ex. 117 at 9. To find on these facts that petitioner did not fairly present his ineffective assistance of trial counsel claim to the PCR trial court would be to engage in exactly the sort of "hairsplitting" recently condemned by the Ninth Circuit. See Weaver v. Thompson, 197 F.3d 359, 364 (9th Cir. 1999).

Not only did petitioner fairly present his ineffective assistance of counsel claim to the PCR trial court, he specifically raised the claim both on appeal to the Oregon Court of Appeals and in his Petition for Review to the Oregon Supreme Court. Although his counsel on appeal from the denial of PCR did not set forth a detailed factual argument in the Petition for Review, the Petition for Review nonetheless repeats the same claim(s) raised in the PCR petition, including the ineffective assistance of counsel claim. Ex. 128, pp. 3-9. As such, petitioner did not procedurally default his first ground for relief.

B. Relief on the Merits

Petitioner alleges that he received ineffective assistance of counsel at trial as a result of his attorney's failure to investigate the background and conduct of the chief prosecuting witness and to use highly damaging impeachment evidence against her. In his memorandum

in support of his Amended Petition, petitioner argues specifically that his trial counsel should have discovered and impeached the victim with information relating to: 1) a false fire complaint; 2) assaultive history; 3) an escape conviction; and 4) mental health and anger control treatment.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must show both (1) that his attorney's performance fell below an objective standard of reasonableness; and (2) that the performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Chacon v. Wood, 36 F.3d 1459, 1463 (9th Cir. 1994). The first part of this test requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. While this burden is not insurmountable, there is a strong presumption that counsel's conduct falls within "the wide range of reasonable professional assistance." Id. at 689; Wade v. Calderon, 29 F.3d 1312, 1316 (9th Cir. 1994) (quoting Strickland, 466 U.S. at 689), cert. denied, 513 U.S. 1120 (1995).

To establish the second prong of the Strickland test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In determining whether a defendant was prejudiced by ineffective assistance of counsel, the court should examine whether the "'result of the proceeding was fundamentally unfair or unreliable.'" United States v. Palomba, 31 F.3d 1456, 1460–61 (9th

Cir. 1994), quoting Lockhart v. Fretwell, 506 U.S. 364, 368 (1993)).

Assuming that the exhibits attached to petitioner's memorandum are properly before this court, and further assuming that by failing to use the impeachment evidence against the victim, trial counsel made errors so serious that he was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment, this court nevertheless finds that petitioner could not show that he was prejudiced in any way by the alleged shortcomings. In light of petitioner's own inconsistent account of the event, even if the impeachment evidence cited by petitioner had been used at trial, there is no reasonable probability that the result of the proceedings would have been different. Accordingly, petitioner is not entitled to relief on his claim that he received ineffective assistance of trial counsel.

II. Ground Four – – Ineffective Assistance of Appellate Counsel[2]

A. Procedural Default

Respondent contends that petitioner procedurally defaulted his ineffective assistance of appellate counsel claim because it was not properly alleged in his PCR petition and therefore not actually litigated at the PCR trial court level. Even if the claim was properly raised before the PCR trial court, however, respondent further contends that it was nevertheless not "fairly presented" to the Oregon appellate courts.

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[2] For reasons that will become clear below, the remaining grounds for relief are considered out of order for the purposes of the procedural default analysis.

Petitioner's ineffective assistance of appellate counsel claim was raised and decided at the PCR trial court level. The first amended PCR petition (which was prepared by counsel) specifically invoked the Sixth and Fourteenth Amendments to the United States Constitution and alleged that appellate counsel failed to "raise issues that had been preserved for appeal" or "obtain trial transcripts in a timely manner and in order to provide a thorough and proper appeal." Ex. 114, p. 5. The trial court received legal argument and evidence on the issue, and its Memorandum of Opinion directly addressed the claim. Ex. 123, p. 4 ("Appellate counsel need not present every colorable issue. Jones v. Barnes, 463 U.S. 745 (1983)").

The more difficult issue is whether the claim was "fairly presented" to Oregon's appellate courts. The brief on appeal to the Oregon Court of Appeals filed by petitioner's counsel, while purporting to satisfy the minimal requirements of Balfour (which are discussed in detail below), failed to do so. Section B of the brief, which ordinarily consists of the assignments of error and argument provided by the prisoner, merely repeats exactly the same claims for relief alleged in petitioner's original *pro se* PCR petition and in the *pro se* trial memorandum submitted by petitioner to the PCR trial court. However, those claims include the following:

> Second Claim For Relief: Ineffective Assistance of Appellate Counsel.
>
> Facts: Mr. Jesse Wm. Barton did knowingly and willfully fail to file in a timely matter a notice of my intention to appeal in the Oregon ruling to the Oregon Supreme Court as I had informed their office by mail. Their response

was that I had to file pro-se and that they would not help me. I informed them that previous case law indicated that this per se ineffective assistance of counsel.

Mr. Jesse Wm. Barton did fail to raise issues on appeal. The prosecuting Attorney's [sic] did state in their Brief that I the defendant did fail to raise the issues in my arguments. It is not that I the defendant failed to raise the arguments but that this Attorney failed to raise the issues for me as I asked stating that I was to raise the issues on post-conviction.

Ex. 125, pp. 5-6 (emphasis added).

Petitioner fared better in the Petition for Review filed by counsel with the Oregon Supreme Court. There, counsel at least mentioned the pertinent federal constitutional provisions. Ex. 127, pp. 2-3. However, claims may not be presented in a Petition for Review to the Oregon Supreme Court unless they are first raised before the Oregon Court of Appeals. Oregon Rules of Appellate Procedure 9.20(2); State v. Casterion, 317 Or. 202, 217, 856 P.2d 616 (1993). Thus, the issue is whether petitioner fairly presented his ineffective assistance of counsel claim to the Oregon Court of Appeals.

Although it is a close call, this court finds that petitioner did fairly present that claim to the Oregon Court of Appeals. As in another recent Ninth Circuit case, '[a]lthough petitioner did not specifically argue that the brief filed by his appellate counsel violated Anders v. California, 386 U.S. 738 (1967), his petition was sufficient to alert the state to both state and federal precedent

governing his claim of ineffective assistance of counsel, including Anders." Delgado v. Lewis, 181 F.3d at 1091. Petitioner, who is not a legal scholar, did his best to point out that his appellate counsel failed to raise issues on appeal and failed to timely file a notice of appeal to the Oregon Supreme Court. This is the same claim that was submitted to, and decided by, the PCR trial court. Petitioner no doubt expected the same consideration of this claim by the appellate courts, despite the obstacles presented by an inadequate Balfour brief on appeal.

Moreover, although the Oregon Court of Appeals granted the state's motion for summary affirmance on the basis that no substantial question of law was presented, the statute under which the affirmance was granted specifically provides that "[a] dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal." O.R.S. 138.660. Accordingly, petitioner did not procedurally default his ineffective assistance of appellate counsel claim.

B. Relief on the Merits

Petitioner contends that his representation during his direct appeal from the second re-sentencing was unconstitutionally ineffective under Anders, supra. Shortly after issuance of the original Findings and Recommendation in this case, the United States Supreme Court issued its decision in Smith v. Robbins, 120 S.Ct. 746 (2000), which modified the analysis of Anders-type claims of ineffective assistance of appellate counsel.

In Anders, the Supreme Court found inadequate California's procedure which permitted appellate counsel to withdraw upon filing a conclusory letter stating that the

appeal had "no merit" and permitted the appellate court to affirm the conviction upon reaching the same conclusion following a review of the record. It then set forth the following procedure to protect an indigent defendant's constitutional right to appellate counsel:

> [I]f counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal. . . .

Anders, 386 U.S. at 744.

After reviewing the constitutional requirements of Anders in conjunction with the Oregon rules of professional conduct governing attorneys, the Oregon Supreme Court in Balfour, supra, rejected Anders as the only constitutional solution to the problem of frivolous appeals by indigent defendants. It held that a court-appointed appellate attorney "who, after a diligent examination of the whole record and appropriate consultation with defendant and trial counsel, is faced with a conclusion that only frivolous issues exist for appeal, has no mandatory ethical obligation to withdraw from the representation." Balfour, 311 Or. at 448, 814 P.2d at 1078. It reasoned

that an Anders brief was required only when counsel was seeking to withdraw from representation. Therefore, in the absence of a duty to withdraw, the court concluded that there is no constitutional requirement for an Anders brief, explaining:

> If, however, counsel does not seek to withdraw, the core constitutional concerns for which the Anders brief were designed disappear. First, there will be no danger of the indigent appellant's proceeding unrepresented through the appeal. Second, the appellate court will not need an Anders brief to assess whether to permit counsel to withdraw, because counsel will not have withdrawn.

Id. at 450-51, 814 P.2d at 1079.

The court then fashioned the following procedure for appointed counsel representing indigent persons in Oregon with a constitutional right to counsel in their criminal appeal:

> 1. Appointed counsel shall file a timely notice of appeal (if one has not been filed before counsel was appointed) in all cases which the client wishes to take an appeal;
>
> 2. Appointed counsel shall review thoroughly the record and discuss the case with trial counsel and the client;
>
> 3. If counsel thereafter determines that there are no meritorious issues for appeal, counsel nonetheless shall seek to provide the "active advocacy" demanded by Anders to the fullest extent ethically possible. That can be done by

filing an appellant's brief with the court that meets the following standards.

4. The appellant's brief shall be divided into two sections, Section A and Section B. Section A of the appellant's brief shall contain a statement of the case, including a statement of facts, sufficient to apprise the court of the jurisdictional basis for the appeal. Section A, under those circumstances, shall contain no assignments of error or argument.

5. Counsel shall also determine whether the client seeks to raise with the court any issue that the lawyer has determined to be frivolous. If the client does not seek to raise any issue, then the appellant's brief shall be comprised solely of Section A, as described above.

6. If the client seeks to raise one or more issues with the court that counsel considers to be frivolous, the brief shall contain a presentation of the issue or issues in a Section B. Section B of the appellant's brief, under those circumstances, shall raise any claim of error requested by the client.

7. Counsel shall provide the client with appropriate legal advice on these claims of error, but shall present to the court in the brief the issue that the client seeks to raise in the manner that the client seeks to raise it. In so doing, counsel's role is limited to attempt to see to it that the client states the issues and arguments

> in proper appellate brief form and the brief is timely filed.

Id. at 450-51, 814 P.2d at 1080 (internal citations omitted).

In essence, counsel avoids any ethical prohibition against advancing issues of questionable merit by not arguing them, but simply assists the client in preparing that portion of the brief raising such issues which counsel does not sign. Under these procedures, the court determined that review of the entire record by the appellate court is not required:

> The Court of Appeals shall consider and decide whatever issues are raised in these appeals in the same manner as it considers and decides issues that are raised in any other direct criminal appeal. The Court of Appeals is not required to search the record for error, whether an appeal is filed by a person who has appointed counsel or retained counsel, because a defendant represented by retained counsel would not necessarily receive such a review on appeal.

Id. at 452-53, 814 P.2d at 1080.

In its original Findings and Recommendation, this court concluded that the Balfour procedure fell short of the protections constitutionally mandated by Anders. Notwithstanding the apparent statements in Anders to the contrary, however, the Supreme Court in Smith held that Anders did not mandate a particular procedure. Rather, the Court defined the procedure described in Anders as "a prophylactic one; the States are free to adopt different

procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel." Smith, 120 S.Ct. at 753. "A State's procedure provides such review so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." Id. at 759 (footnote and citations omitted). Moreover, "[i]n determining whether a particular state procedure satisfies this standard, it is important to focus on the underlying goals that the procedure should serve — to ensure that those indigents whose appeals are not frivolous receive the counsel and merits brief required . . . and also to enable the State to 'protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent.'" Id. at 760 (citation omitted).

Examining the new procedures adopted in response to Anders by the State of California in People v. Wende, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (1979), the Court found they comported with constitutional requirements for effective appellate counsel on direct appeal. Given the gravity of the question involved and the explicit directive in Smith that each state's procedures be examined separately, Balfour must undergo the same examination here.

The California procedures as described in Wende are remarkably similar to those set forth in Balfour, although with one crucial difference. The duties of appellate counsel under Wende are virtually identical to Balfour: appointed appellate counsel must attest that he has reviewed the record, explained his evaluation of the case to his client, provided the client with a copy of the brief, and informed the client of his right to file a *pro se* supplemental brief. Smith, 120 S.Ct. at 753. In the submission to the court, after briefly outlining the facts surrounding the trial and failing to present any possible grounds for appeal, appellate counsel includes a request that the court itself review the record for arguable issues. Id. Counsel neither explicitly states that his review has led him to conclude that an appeal is frivolous nor requests to withdraw. Id. "Instead, he is silent on the merits of the case and expresses his availability to brief any issues on which the court might desire briefing." Id. (citations omitted).

The duty of the appellate court is where the Wende and Balfour procedures diverge. In California, upon receipt of a Wende brief, the appellate court is obligated to review the entire record, regardless of whether the defendant has filed a *pro se* brief. Id. (citations omitted). If the appellate court, after its review of the record pursuant to Wende also finds the appeal to be frivolous, it may affirm. Id. (citations omitted). If, however, it finds an arguable (i.e., nonfrivolous) issue, it orders briefing on that issue. Id. (citations omitted). As noted above, under Balfour the Oregon courts undertake no such independent review of the record. Rather, they consider and decide the appeal solely on the issues raised in the Section B portion of the brief, presumably without the benefit of additional briefing should any of those issues prove nonfrivolous.

The Wende procedure was analyzed in Smith in light of several factors considered in prior cases in which the constitutionality of various appellate procedures was addressed. First, the Court noted that a significant factor in Anders was that the procedure condemned there "did not

require either counsel or the court to determine that the appeal was frivolous; instead, the procedure required only that they determine that the defendant was unlikely to prevail upon appeal." Id. at 761 (citations omitted). Wende, by contrast, requires both counsel and the court to find the appeal frivolous. Id. Under Balfour, however, only counsel makes the determination that the appeal is frivolous. The Court of Appeals is simply required to "consider and decide whatever issues are raised in these appeals the same manner as it considers and decides issues that are raised in any other direct criminal appeal." Balfour, 311 Or. at 452-53, 814 P.2d at 1080.

Because the Court referred to "counsel or the court," rather than "counsel and the court," respondent argues that a determination by appellate counsel that no nonfrivolous issues exist for appeal is sufficient without requiring a second tier of review by the appellate court. This argument is not supported by other language in Smith clearly requiring at least two tiers of review before a state system will pass constitutional muster.

The Court specifically noted that procedures previously found unconstitutional provide only a single tier of review. Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958) (trial judge made sole determination whether appeal should proceed); Lane v. Brown, 372 U.S. 477 (1963) (public defender could preclude defendant from appealing by refusing to request transcript). In contrast, the Wende procedure "does not suffer from this flaw, for it provides at least two tiers of review." Smith, 120 S.Ct. at 762. The lack of a separate review of the record by the appellate court under Balfour results in a single tier of review.

The Court also compared Wende favorably to a Wisconsin procedure approved by McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429 (1988). Wisconsin adopted a rule that required an Anders brief filed by court-appointed counsel to include a discussion of why the issues raised in the brief lacked merit. Presumably, the appellate court reviewed only the parts of the record cited by counsel in support of the "arguable" issues he raised.[3] Smith, 120 S.Ct. at 763. Giving perhaps the most specific direction to the appellate courts as to their function, the Court in McCoy stated:

> Unlike the typical advocate's brief in a criminal appeal, which has as its sole purpose the persuasion of the court to grant relief to the defendant, the Anders brief is designed to assure the court that the indigent defendant's constitutional rights have not been violated. To satisfy federal constitutional concerns, an appellate court faces two interrelated tasks as it rules on counsel's motion to withdraw. First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous.

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[3] Despite this characterization in Smith, McCoy arguably does not support such a presumption. The Court's statement there that "[o]nce the court is satisfied both that counsel has been diligent in examining the record for meritorious issues and that the appeal is frivolous, federal concerns are satisfied" can be read as implying that the court did undertake a separate review of the record. McCoy, 486 U.S. at 444.

* * *

> Once the court is satisfied both that counsel has been diligent in examining the record for meritorious issues and that the appeal is frivolous, federal concerns are satisfied and the case may be disposed of in accordance with state law. Of course, if the court concludes that there are nonfrivolous issues to be raised, it must appoint counsel to pursue the appeal and direct that counsel to prepare an advocate's brief before deciding the merits.

McCoy, 439 US at 442-44.

Wende, "by contrast, requires a more thorough treatment of the record by both counsel and court." Smith, 120 S. Ct. at 763 (citation omitted). The Oregon Balfour procedure, on the other hand, provides neither the protection of a legal explanation from counsel as to why the appeal is frivolous nor an independent second examination of the record by the appellate court.

Another significant factor discussed in Smith was the condemnation in Anders of the procedure which allowed a one paragraph letter from counsel stating only his "bare conclusion" that the appeal had no merit. Noting the difficulty of severing this issue from the Anders objection to the lack of a finding of frivolity, the Court nevertheless notes that the Wende brief provides more than a one-paragraph "bare conclusion." Id. "Counsel's summary of the case's procedural and factual history, with citations of the record, both ensures that a trained legal eye has searched the record for arguable issues and assists the reviewing court in its own evaluation of the case." Id.

(emphasis added). Again, although Balfour requires counsel to submit a procedural and factual history, with citations to the record, the critical missing factor is the lack of evaluation of the case by the appellate court to determine if there are any arguable issues that have been overlooked by counsel.

Even if a second tier of review is required, respondent relies on the conclusion in Balfour that the Oregon statutory PCR procedures with assistance of court-appointed counsel "is a constitutionally sufficient additional safeguard to assure that appellate counsel's judgment that there are no non-frivolous issues for appeal was correct." Balfour, 311 Or. at 453-54, 814 P.2d at 1081. However, that argument ignores a crucial difference between a direct appeal and PCR. A defendant has the constitutional guarantee of the right to adequate assistance of appellate counsel on direct appeal, but not for state collateral proceedings or federal habeas corpus proceedings. Bonin v. Vasquez, 999 F.2d 425, 430 (9th Cir. 1993).

If appellate counsel fails to raise arguable issues on direct appeal, then PCR counsel should raise the issue of ineffective assistance of appellate counsel. However, there is no guarantee that appointed PCR counsel will provide any more assistance that was provided by ineffective direct appeal counsel. Both could file Balfour briefs, as was done in this case. Yet the ineffectiveness of PCR counsel does not excuse the procedural default caused by that counsel, which may doom valid claims overlooked by that counsel. Coleman v. Thompson, 501 U.S. at 752 (PCR appellate counsel's failure to file timely notice of appeal does not constitute cause to ex-

cuse the procedural default because there is no constitutional right to PCR counsel). If Oregon accepts the benefits of the law governing procedural default due to PCR counsel's failure to exhaust a federal constitutional claim, then it should not be permitted to skirt its obligation to provide the required second tier of review on direct appeal by relying on non-constitutionally mandated PCR counsel.

Admittedly, an independent review of the record for points of arguable error is a function that the appellate court performs for no other class of appellants. When no arguable issues are raised by court-appointed counsel, an indigent defendant could secure a more complete review than a non-indigent defendant whose retained counsel raises some meritorious points. The latter is not entitled to the court's independent review to raise other arguable points that retained counsel may have overlooked. However, Anders and Smith are grounded more on ensuring the right to effective counsel than on equal protection concerns. Martha C. Warner, Anders in the Fifty States: Some Appellants' Equal Protection is More Equal than Others', 23 FLA ST U L REV 625, 641–42 (1996).

Yet another significant factor discussed by Smith relates to the prior practice of allowing counsel to withdraw. The pre-Anders practice permitted an appellate court to allow counsel to withdraw and thereafter to decide the appeal without appointing new counsel. As the Court noted, any doubt as to the constitutionality of this practice was resolved in Penson v. Ohio, 488 U.S. 75, 82–83 (1988), which struck down a procedure that allowed counsel to withdraw before the court had determined whether counsel's evaluation of the case was accurate, and also allowed a court to decide the appeal without counsel even if the court found arguable issues. Smith, 120 S.Ct. at 761.

The Penson procedure violated the right described in Douglas v. California, 372 U.S. 353 (1963), to have counsel until a case is determined to be frivolous and to receive a merits brief for a nonfrivolous appeal. Id. By contrast, the Wende procedure does not violate this right, "both because counsel does not move to withdraw and because the court orders briefing if it finds arguable issues." Id. (citations omitted, emphasis added). As with the Wende procedure, counsel does not move to withdraw under the Balfour procedure. However, because the court does not undertake an independent review of the record, the Oregon Court of Appeals has no commensurate procedure to order briefing if it finds arguable issues. Rather, it simply considers and decides the issues raised in the Section B portion of the brief.

As noted above, the Oregon Court of Appeals did not issue a written opinion disposing of petitioner's appeal from the denial of his PCR claim that he received ineffective assistance of appellate counsel on direct appeal from the second re-sentencing. Having thus undertaken an independent review of the record and the relevant federal law, however, it is apparent that the Oregon Court of Appeal's resolution of this claim was indeed an unreasonable application of clearly established federal law. A comparison between Oregon's procedure under Balfour and those previously considered by the United States Supreme Court, particularly California's Wende procedure at issue in Smith, demonstrates that Oregon's Balfour procedure does not afford adequate and effective appel-

late review for criminal indigents. The next issue is whether petitioner is entitled to a conditional writ of habeas corpus, requiring the State of Oregon to reinstate petitioner's direct appeal from the second re-sentencing and to appoint new appellate counsel to represent him. Respondent argues that petitioner first has another hurdle to overcome, namely that he did in fact receive ineffective assistance of counsel under the Strickland standard of review.

Because petitioner did not receive the protections of a procedure that is constitutional under Anders and the other precedents, and therefore did not receive all the procedural protection required by the Constitution, prejudice must be presumed. Penson, 488 US at 85-89. Smith did not presume prejudice because it found the Wende procedure constitutionally valid; instead, Smith applied the Strickland standard of review. Here, unlike the Wende procedure, the Balfour procedure is constitutionally infirm due to the lack of appellate court review. Although counsel did not actually withdraw, as in Penson, petitioner suffered the equivalent of a denial of assistance of counsel who failed to present any issues on his behalf, knowing full well that the Oregon Court of Appeals would not independently evaluate the case for arguable issues overlooked by counsel. Therefore, it is premature to determine if petitioner received ineffective assistance of counsel under the Strickland standard of review. Instead, prejudice must be presumed until the Oregon Court of Appeals first complies with the federal constitutional requirements. Accordingly, petitioner is

entitled to a conditional writ of habeas corpus with respect to ground four.[4]

III. Grounds 2 and 3 – – Waiver of Right to Counsel and Vindictive Sentence

In his second and third grounds for relief, petitioner alleges that he did not voluntarily waive his right to counsel at the second re-sentencing, and that the second re-sentencing resulted in an unconstitutionally vindictive sentence. Neither of these grounds have been exhausted in state court. Petitioner attempted to raise both grounds in his portion of the Balfour brief filed on direct appeal, but no Petition for Review was filed with the Oregon Supreme Court. Thus, the issues were not fairly presented to Oregon's highest court.

Were this a situation where the claims had been exhausted, or where the claims addressed the legality of the conviction rather than the sentence, it would be incumbent upon this court to decide them on the merits, notwithstanding the recommendation that the writ be conditionally granted on petitioner's ineffective assistance of counsel claim. See Robbins v. Smith, 152 F.3d 1062, 1068 (9th Cir. 1999), rev'd on other grounds by Smith v. Robbins, supra. Where, however, the claims have not been exhausted, this court should not "sit in place of the [Oregon] Court of Appeals in the first instance to deter-

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[4] If the appellate court independently reviews the record and finds any arguable issue for appeal which is not procedurally barred, then the issue can be briefed on the merits and decided by the appellate court. That procedure necessarily would obviate any constitutional claim by petitioner for ineffective assistance of appellate counsel except for procedural errors.

mine whether petitioner was prejudiced as to any appellate issue." Penson, 488 U.S. at 87, n.9.

Principals of comity dictate that the Oregon appellate courts first be given the opportunity to decide whether petitioner voluntarily waived his right to counsel at the second re-sentencing and whether the second re-sentencing resulted in an unconstitutionally vindictive sentence. Accordingly, this court should not rule upon petitioner's second and third grounds for relief, but should await resolution of petitioner's reinstated direct appeal from his second re-sentencing.

RECOMMENDATION

Based on the foregoing, this court recommends that the Amended Petition (docket #19) be DENIED on the first ground for relief, conditionally GRANTED on the fourth ground for relief, and DENIED as premature on the second and third grounds for relief. Accordingly, the State of Oregon should be required to reinstate petitioner's direct appeal from his second re-sentencing, and counsel should be appointed to represent him on that appeal.

SCEDULING ORDER

Objections to these Findings and Recommendation(s), if any, are due **June 26, 2000.** If no objections are filed, then the Findings and Recommendation(s) will be referred to a district court judge and go under advisement on that date.

If objections are filed, then the response is due within 10 days after receipt or no later than **July 14, 2000.** When the response is due or filed, whichever date is earlier, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement.

DATED June 8, 2000.

s/Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge